UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GADECATUR SNF LLC dba EAST LAKE ARBOR, and RETAIL, WHOLESALE & DEPARTMENT STORE UNION-SOUTHEAST COUNCIL	Case 10- CA-262818

EMPLOYER'S RESPONSE TO GENERAL COUNSEL'S MOTION TO TRANSFER PROCEEDINGS TO THE BOARD FOR SUMMARY JUDGMENT AND ISSUANCE OF A DECISION AND ORDER

On August 3, 2020 Counsel for the General Counsel filed a Motion to Transfer Proceedings to the Board for Summary Judgment and Issuance of a Decision and Order. On August 5, 2020, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause.

GADecatur SNF LLC d/b/a East Lake Arbor ("East Lake" or "Respondent") generally agrees with the General Counsel's procedural timeline and that this case involves a test of certification. Respondent is challenging the Acting Regional Director's certification of Charging Party as the collective bargaining representative of the employees in the unit found appropriate in Case 10-RC-249998.

Respondent reasserts, preserves, and does not waive any and all arguments presented by it in Case 10-RC-249998. Respondent incorporates by reference here, its Request for Review of the Acting Regional Director's Decision and Order dated February 19, 2020 (attached to General Counsel's Motion as Exhibit 8).

Respondent opposes Counsel for the General Counsel's motion for the following reasons:

I. Summary Judgment Should Be Denied Because the Acting Regional Director Misapplied the Existing Board Standard and Erred in Finding that Charging Party Did Not Engage in Objectionable Conduct in Case 10-RC-249998.

Summary Judgment should be denied and the Region's Certification of Representative in Case 10-RC-249998 should be revoked. Based on Respondent's arguments in its Request for Review of the Acting Regional Director's Decision and Order of February 19, 2020, the Board should deny the General Counsel's Motion for Summary Judgment. The Acting Regional Director erroneously determined that Charging Party did not engage in objectionable conduct during the November 12, 2019 election that disturbed the laboratory conditions of the election, nullified the results, and warranted conducting a rerun election.

Specifically, on the day of the election and while the polls were open, five (5) clearly identifiable Union representatives, including at least two (2) Union officers known to eligible employees, entered Respondent's premises without authorization and fomented a loud, hostile, and disturbing ruckus immediately outside the sole entrance to the polling place. The Union agents and representatives then escalated the disruption, by not only blocking the voting area, but also causing a cacophony loud enough to be heard by eligible voters on both floors of Respondent's facility. The Tally of Ballots demonstrates that ten percent (10%) of the bargaining unit did not vote in the election, and that one vote would have been sufficient to change the result of the election.

Under existing Board law, in determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers the following nine (9) factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the

degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the part against whom objections are filed. *Taylor Wharton Division,* 336 NLRB at 158, citing *Avis Rent-a-Car,* supra.

The Acting Regional Director reduced these nine factors to a mathematical exercise. She (erroneously) added together the factors she perceived to favor Respondent and those which were averse to Respondent, tabulated and compared the results. But the Board has not historically, and should not now, endorse so rigid an application of its test. Logically, every factor identified in *Avis* in every case cannot carry precisely the same weight. Indeed, in some contexts, certain of the factors may not be applicable at all. Respondent submits that when properly weighed and objectively judged, the factors lead inexorably to the conclusion that the election must be re-run.

II. The Acting Regional Director Improperly Distinguished Extant Board Law

Respondent cited to the Hearing Officer three cases in support of its position that the presence of the Union representatives in the polling area during the vote constituted objectionable conduct. The Hearing Officer found that *Nathan Katz Realty,* 251 F.3d 981 (2001), *Electric Hose and Rubber Co.*, 262 NLRB 186 (1982) and *Performance Measurements Co.*, 148 NLRB 1657 (1964) are distinguishable because "in those cases, the party representative(s) were near the entrance to the voting area for most, if not all, of the voting session." The Acting Regional Director summarily rejected the Respondent's contention that the special circumstances here warranted application of the principles applied in those cases.

The Acting Regional Director and the Hearing Officer mistake the import of those

decisions. The Board does not simply measure the length of time party representatives are present at the polling area. Rather, the Board measures the impact on the election of the misconduct. In a close election such as this, the presence of the Union's representatives for even the span of ten minutes could coerce enough employees into abstaining from the vote as to skew the outcome of the election. One affected employee would have been enough to change the election results. The Acting Regional Director's conclusion that the Hearing Officer followed extant Board law is simply wrong.

III. Conclusion

For these reasons, and the reasons set forth in Respondent's Request for Review of the Acting Regional Director's Decision and Order of February 19, 2020, which has been incorporated here by reference, and its affirmative defenses to the Complaint, Summary Judgment should be denied, the Complaint should be dismissed, and the previously issued Certification of Representative should be revoked.

Respectfully Submitted,

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August 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I caused the foregoing Employer's Response to General Counsel's Motion to Transfer Proceedings to the Board for Summary Judgment and Issuance of A Decision and Order to be filed with the Executive Secretary, National Labor Relations Board using the CM/ECF system.

I further certify that I caused a copy to be served via electronic mail upon the following:

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